Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1774

CIVIC AWARENESS OF AMERICA, LTD., a non-profit Wisconsin corp., ROSE EMMONS and JOANNE KUFFEL,

Petitioners,

vs.

SECRETARY OF H.E.W., DONALD S. BUZARD, President of Planned Parenthood Association of Milwaukee, PLANNED PARENTHOOD ASSOCIATION OF MILWAUKEE and PLANNED PARENTHOOD-WORLD POPULATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
I. THERE IS NO CONFLICT AMONG THE CIRCUITS	5
II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW	5
A. Establishment	5
B. Free Exercise	7
C. Innovative Pattern of Sexual Behavior	8
III. THE DECISION BELOW IS CLEARLY CORRECT	8
A. Religion Clauses	8
B. Taxpayer Standing	9

C. *Administrative Procedure Act* 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Page

Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152 (1970) 10

Bailey v. Patterson, 369 U.S. 31, 32-33 (1962) 9, 10

Baker v. Carr, 369 U.S. 186, 204 (1962) 9

Bradfield v. Roberts, 175 U.S. 291 (1899) 5

Braunfield v. Brown, 366 U.S. 599 (1961) 7

Board of Education v. Allen, 392 U.S. 236 (1968) 7

Engel v. Vitale, 370 U.S. 421 (1962) 8

Flast v. Cohen, 392 U.S. 83 (1968) 9

Griswold v. Connecticut, 381 U.S. 479 (1965) 8

Lemon v. Kurtzman, 403 U.S. 602 (1971) 5

McGowan v. Maryland,
366 U.S. 420, 465-466 (1961) 6

Meek v. Pittinger,
421 U.S. 349 (1975) 5

Roe v. Wade,
410 U.S. 113 (1973) 8, 9

Roemer v. Board of Public Works of Maryland,
U.S. (1976) 5

Schlesinger v. Reservists Committee to Stop the War,
418 U.S. 208 (1974) 9

Sierra Club v. Morton,
405 U.S. 727 (1972) 9

Simon v. Eastern Kentucky Welfare Rights Organization,
U.S. (1976) 9, 10

Tileston v. Ullman,
318 U.S. 44 (1943) 9

Tilton v. Richardson,
403 U.S. 672 (1971) 7

United States v. Richardson,
418 U.S. 166 (1974) 9

Warth v. Seldin,
422 U.S. 490 (1975) 9, 10

Watkins v. Chicago Housing Authority,
406 F.2d 1234, 1236 (7th Cir. 1969) 10

Statutes

Family Planning Services and Population Research Act of 1970 (Tydings Act) 4

Social Security Act of 1935
Sec. 508(a), 42 U.S.C. Sec. 708(a) 4

Miscellaneous

Freund, *Public Aid To Parochial Schools*,
82 *Harv. L. Rev.* 1680 (1969) 6-7

"Need for Services" Portion of House of Representatives' Report No. 91-1472,
3 *U.S. Code and Congressional News* 5068, 5070-71 (1970) 5,10,101-103

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OPINIONS BELOW

The opinions below are adequately set forth in the petition and appendices.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(1) Does cited federal family planning legislation tend to establish the religion of secular humanism in violation of the First Amendment?

(2) Does cited federal family planning legislation prohibit the free exercise of petitioners' religion in violation of the First Amendment?

(3) Do petitioners have standing, either as taxpayers or as "persons aggrieved by agency action" under the Administrative Procedure Act to challenge the lawfulness of expenditures under cited federal family planning legislation?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions set forth in the petition, petitioner also argues that the Fifth Amendment to the United States Constitution is involved.

STATEMENT OF THE CASE

I. The petitioners claim that two federal family planning statutes which give freedom of choice in family planning matters to indigent persons contravene the religion clauses of the First Amendment to the Constitution. Their central premise is that the dispensing of family planning advice and materials (e.g. contraceptives) is a "religious" activity. In fact, the case is a transparent attempt by petitioners to use the religion clauses to invalidate government expenditures which

they oppose and thereby impose their religious beliefs upon all Americans. The District and Circuit Courts found petitioners' claims to be insubstantial, frivolous and wholly without merit and declined to convene a three-judge court.

The "religion" allegedly established by the challenged statutes, i.e., secular humanism, is not a recognized, organized or identifiable religion.* Equally important, petitioners do not allege any connection between defendants and the alleged religion. Even if the petitioners could surmount the threshold "religion" requirement, the logical conclusion of their argument is that government support of any activity consistent with the tenets of a particular religion violates the establishment clause. The courts below had little trouble finding such an argument to be a frivolous constitutional attack.

The courts below also found the free exercise claim of the petitioners to be insubstantial, frivolous and without merit. The petitioners have not alleged that the defendants restrained or coerced petitioners' practice of their religious beliefs.

II. Petitioners' statement of the case is inadequate in a number of particulars:

(1) The primary purpose of Planned Parenthood is not, as stated in the petition, to obtain federal funds, but

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* Secular humanism is mentioned in two Supreme Court footnotes; both cases involved classic free exercise claims of direct coercion against the freedom of belief of the plaintiff. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (oath for notary public to express belief in God) and *Welsh v. United States*, 398 U.S. 333, 357 (1970) (conscientious objector), citing *Torcaso, supra*.

rather, as alleged in the amended complaint, to provide family planning services to all persons including those of low income. One means of financing that purpose is through grants of the type in issue in this case.

(2) Petitioners have not alleged that any defendant is a religious organization or acting on behalf of a religious organization, or that the funds granted were used or to be used for any sectarian purpose.

(3) Section 508(a) of the Social Security Act, as amended, and the Family Planning Services and Population Research Act of 1970 expressly condition all grants on voluntariness. (Petition, Appendix pp. 2, 3, 7 and 9).

(4) No allegations in the record support the inclusion of abortion in plaintiffs' fifth and sixth Questions Presented and at pp. 4, 5 and 7 of petitioners' Statement of The Case, or of cloning in petitioners' title to their first reason for granting the petition, p. 8.

(5) There is no basis in the record, express or implied, for the allegation on p. 7 of the petition that grants under the family planning statutes "require plaintiffs to support a religion of human procreation and the use of federally supported genetics and selective population control all of which is contrary to their own and to the moral standards of the people of the United States for the greater part of its history."

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

The decision of the Court of Appeals, adopting and confirming the two decisions of the District Court, plainly is not in conflict with the decision of another Court of Appeals on the same matter, nor does it in any way conflict with applicable decisions of the Supreme Court, and the petition makes no assertion to that effect.

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

A. Establishment.

The challenged statutes provide government support of plainly secular activities which have a plainly secular purpose. (See portion of House of Representatives' Report No. 91-1472, attached as Exhibit A.) Their principal and primary effect neither advances nor inhibits religion and there is no entanglement of the sovereign with religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). They involve no "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz v. Commissioner,* 397 U.S. 664 (1970).

The decision below is *a fortiori* correct in the light of both earlier, *Bradfield v. Roberts,* 175 U.S. 291 (1899) and more recent Supreme Court cases, *Meek v. Pittinger,* 421 U.S. 349 (1975), *Roemer v. Board of Public Works of Maryland,* U.S. decided June 21, 1976, sustaining government support of *admittedly sectarian* institutions for activities having secular purposes. In the instant case, the threshold religion issue is not surmounted by petitioners because the grant recipient is not a sectarian institution. Stated in its most direct terms, petitioners' argument is that a grant

for a secular purpose to a secular institution advances a religion with which the grant recipient has no alleged connection because the purpose of the grant is not consistent with the tenets of petitioners' religion.

The petitioners' argument was met many years ago by Mr. Justice Frankfurter in his concurring opinion in *McGowan v. Maryland,* 366 U.S. 420, 465-466 (1961) in the following language:

> "The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any *purely* religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, *as religion,* an object of legislation.
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> * * *
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> "With regulations which may have *other objectives* the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned. . . . *But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."* (emphasis added).

The allegation that support of secular activities not consistent with the teachings of a particular religion itself constitutes a religion, is a fallacy long ago recognized by, among others, Professor Paul Freund:

> "Now we are ready to consider the alternative view of inseparability – that public school education is itself necessarily religious, but in a perverse sense, as so-called secularism is itself a form of religion, however degraded a form. If a state school worships the Anti-Christ, equal support is due to a school that

> worships Christ. But we must be careful not to construct a syllogism out of a metaphor of this kind, anymore than out of the countervailing metaphor, 'wall of separation.' To say Americans worship what Williams James called the bitch-goddess, Success, is not to assert anything relevant to the usage of 'religion' in the 1st Amendment. To say that the absence of Crucifixes or Torahs in a public school is itself a religious statement is either a play on words or an idiosyncratic characterization, like the Jehovah's Witnesses' view of the flag salute, which is not controlling as a definition of religion." 82 *Harv. L. Rev.* 1680, 1690 (1969).

B. Free Exercise.

Equally insubstantial is petitioners' contention that the cited federal family planning legislation violates the Free Exercise clause of the First Amendment. The argument that plaintiffs' Free Exercise rights have been violated because they are being "coerced" into supporting, through taxes, activities contrary to their religious beliefs has been flatly rejected by the Supreme Court, *Tilton v. Richardson,* 403 U.S. 672 (1971); *Board of Education v. Allen,* 392 U.S. 236 (1968).

Petitioners allege no coercion to themselves by reason of the federal planning grants. It has been long established that the Free Exercise clause does not preclude government support of an activity which is contrary to a religious tenet of a particular plaintiff unless that activity somehow directly coerces the plaintiff. *Braunfield v. Brown,* 366 U.S. 599 (1961). The named plaintiffs do not allege that they are being personally required to use family planning methods such as artificial contraception.

Petitioners' allegation of *de facto* coercion of the poor is rebutted on its face by the express insistence on voluntariness

in the grant legislation. *Engel v. Vitale,* 370 U.S. 421 (1962) is not analogous. Nothing in the challenged legislation or any other governmental act requires mandatory attendance at a Planned Parenthood clinic. Furthermore, plaintiffs do not allege that "the poor" are part of their class.

C. Innovative Pattern of Sexual Behavior.

Petitioners argue that the challenged legislation promotes "a specific, innovative pattern of sexual behavior" in violation of Supreme Court cases such as *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Roe v. Wade,* 410 U.S. 113 (1973). No rational reading of the statutes involved can equate the grants to provide voluntary family planning information and advice with promotion of a pattern of sexual *behavior* or sexual *conduct;* the assertion is wholly frivolous.

Moreover, *Griswold* and *Roe* stand for the proposition that the government cannot *prohibit* activity falling within the fundamental constitutional guarantees of individual privacy. Nothing in this voluntary legislation prohibits any particular sexual conduct or otherwise interferes with the individual's freedom of choice as did the statutes condemned in *Griswold* and *Roe.* Indeed, the primary purpose of the challenged legislation is to provide the indigent with that very freedom of choice in family planning decisions which *Griswold* previously guaranteed to non-indigent persons.

III. THE DECISION BELOW IS CLEARLY CORRECT.

A. Religion Clauses.

The decision of the Circuit Court of Appeals sustaining the constitutional validity of federal family planning legislation is in full accord with the decided cases of this court and that decision is obviously correct in the light of those decided cases, as above detailed.

B. Taxpayer Standing.

Petitioners also assign as error the decisions of the Circuit and District Courts with respect to their standing as taxpayers to raise questions of statutory application and interpretation. The lower court decisions follow necessarily from the decided cases of the U. S. Supreme Court. The petitioners have failed to show the direct injury necessary to establish taxpayer standing. *United States v. Richardson,* 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208 (1974).

Petitioners likewise do not come within the *Flast v. Cohen,* 392 U.S. 83 (1968) exception to the direct injury requirement because the challenged statutes do not "exceed specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast v. Cohen, supra,* 102, 103 (1968). In addition to their allegations of First Amendment violations, petitioners argue that the challenged legislation violates the Fifth Amendment because its purpose is to destroy life. The unborn are not, however, "persons" within the meaning of the Fifth Amendment, see *Roe v. Wade, supra* at 158 (14th Amendment) and the petitioners cannot represent a class of which they are not a part. *Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962); see also, *Simon v. Eastern Kentucky Welfare Rights Organization,* U.S. decided June 1, 1976; *Warth v. Seldin,* 422 U.S. 490 (1975). Nor can plaintiffs rely for standing on the alleged threat to another person, *Tileston v. Ullman,* 318 U.S. 44 (1943).

Furthermore, petitioners have no "personal stake in the outcome of the controversy." *Baker v. Carr,* 369 U.S. 186, 204 (1962) and are no more than "concerned bystanders." They seek to do only that which was condemned by the Supreme Court in *Flast v. Cohen, supra,* and *Sierra Club v. Morton,* 405 U.S. 727 (1972):

"[Air] generalized grievances about the conduct of government. . . ." 392 U.S. at 106.

". . . do no more than vindicate their own value preferences through the judicial process." 405 U.S. at 740.

C. Administrative Procedure Act.

The lower court decisions correctly hold that petitioners fail to meet the prerequisites to APA standing: (a) "that the challenged action has caused an injury in fact, economic or otherwise," *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152 (1970) and (b) that the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated" by that action.

The petitioners claim the challenged legislation is causing an injury in fact to unborns. They have no standing to represent unborns, however, because they "cannot represent a class of which they are not a part," *Bailey v. Patterson, supra;* see also *Simon v. Eastern Kentucky Welfare Rights Organization, supra; Warth v. Seldin, supra; Watkins v. Chicago Housing Authority,* 406 F.2d 1234, 1236 (7th Cir. 1969).

It is equally clear that interests which the plaintiffs seek to protect are not within the "zone of interests" protected by the family planning legislation. (See portion of House of Representatives' Report No. 91-1472 attached as Exhibit A.) The family planning legislation gives freedom of choice in family planning matters to medically indigent persons. The plaintiffs, on the other hand, do not want to receive the family planning services supported by the grant nor have others receive them. They seek through this lawsuit to perpetuate anti-family planning value judgments stemming from their religious commitment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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Exhibit A

"Need for Services" Portion of House of Representatives' Report No. 91-1472, 3 *U.S. Code and Congressional News* 5068, 5070-71 (1970).

"Need for services

Available evidence indicates that most couples in the United States want about three children, but that low-income families have more. The problems of excess fertility for the poor result to a large extent from the inaccessibility of family planning information and services. Although family planning is not a panacea for poverty, about one-half of the poor children in our Nation are in families with five or more children.

Medically indigent persons who are usually dependent on public and voluntary agencies for health care may have to do without these services unless they reside in an area where subsidized family planning services are readily available through the public health departments or voluntary agencies.

High fertility, high infant and maternal mortality, and high rates of prematurity are closely related. Both infant mortality rates and mental retardation rates are substantially higher than average among fourth and subsequent live births. These infants account for only 29 percent of all live births but approximately 45 percent of all yearly infant deaths and a larger proportion of infants born mentally retarded.

High infant mortality is also an indication of a high incidence of illness and physical deficiencies in infants. Prematurity, a factor in high infant mortality, is closely related to mental retardation and brain damage.

Although the problems of excessive childbearing in this country are not limited to low-income families, the consequences of unwanted births are most evident among poor families.

The mortality rate of infants born to low-income mothers is nearly double that of infants born to other groups of mothers. A recent study in the city of New Orleans showed that although only 26 percent of the women of reproductive age were poor, they accounted for 72 percent of the stillbirths, 80 percent of the maternal deaths, and 68 percent of the infant deaths. The problem of excessive fertility among the poor lies not so much in its affect on the national birth rate as in the accumulation of difficulties it imposes on the poor themselves. Unwanted pregnancies often wreck any chances for a better life for either parents or children. The unwanted child is a tragedy to himself, to his family, and very often to society.

A recent study indicated that 1,800 out of approximately 3,000 counties in the United States offered no family planning services whatsoever. In over 80 percent of the 1,200 counties which provided services, less than 100 patients per year were served. Ninety percent of approximately 4,000 non-profit general care hospitals in the United States in which most low-income mothers deliver babies offer no family planning programs at all.

Testimony received by the committee indicates that of the estimated 201,162 women in Georgia who are economically eligible for subsidized programs of family planning services, only 16 percent had access to those services.

It was also shown that in San Mateo County, Calif., one of the most affluent counties in the United States, less than one-third of approximately

5,500 medically indigent women who would use family planning services presently find them available.

Of the estimated 5 million medically indigent women who could probably use subsidized family planning services, if available, only one out of four now receive them.

These data indicate a substantial need for subsidized family planning services."